IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9664 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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MULSHANKAR KALYANBHAI JANI

Versus

STATE OF GUJARAT

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Appearance:

M/S THAKKAR ASSOC. for Petitioner

MR KT DAVE, AGP, for Respondent No. 1, 2 & 3

MS PJ DAVAWALA for Respondent No. 4

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CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 16/03/2000

ORAL JUDGEMENT

1. The District Magistrate, Probandar, at Porbandar, passed an order on November 1, 1999, in exercise of powers under Section 3(2) of the Prevention of Black Marketing and Maintenance of Supplies of Essential

Commodities Act,1980 ("PBM Act" for short), detaining the petitioner under the provisions of the PBM Act.

2. The grounds of detention indicate that the officers of the Civil Supplies Department, on interception of tanker No.GJ-4-U-8901, on August 15, 1999, found that the tanker contained controlled blue coloured kerosene. The driver said that the tanker contained wastage diesel of steamer. However, upon further investigation/inquiries, it was found that it was controlled kerosene, which was procured illegally and was proposed to be used for illegal purposes. Ultimately, after getting a specific report from the Forensic Science Laboratory, the detaining authority was satisfied that the petitioner was involved in activities which were detrimental to smooth supply of essential commodities. The detaining authority, therefore, after considering less drastic remedies, came to a conclusion that detention under PBM Act is the only remedy available to the detaining authority for immediately preventing the petitioner-detenu from pursuing his illegal activities.

3. The detenu has assailed the order of detention on various grounds. The main grounds are delay in forwarding the representation and delay in considering the representation by the State Government.

4. Mr. Thakkar, learned advocate appearing for the petitioner, has pressed these two issues. He submitted that representation to detaining authority made on 11.11.1999 was received on 16.11.1999. The authority ought to have forwarded the same on that very day, instead the authority has forwarded that representation to the Government on 18.11.1999. The authority was not required to consider the representation as the order of detention was already approved by the State Government on 12.11.1999 and, therefore, there is a delay of two days in forwarding the representation, according to Mr. Thakkar. Mr. Thakkar submitted that this delay has not been explained in the affidavit in reply filed by the detaining authority.

4.1 On other aspect of delay, Mr. Thakkar submitted that the representation forwarded by the detaining authority was received by the State Government on 19.11.1999 and was decided on 26.11.1999, i.e. after about seven days. Mr. Thakkar has drawn attention of this Court to the affidavit in reply filed on behalf of the State Government to indicate that the representation moved from table to table till it reached the appropriate authority of the State Government on 24.1.1999, who in

turn decided it on 25.11.1999. Mr. Thakkar submitted that the file was, therefore, not properly dealt with. The affidavit in reply filed on behalf of the State Government is only a feeble attempt to explain the delay. According to Mr. Thakkar, at least three days have remained unexplained in processing the file. He submitted that, admittedly, the representation was received on 19.11.1999 and it was placed before the Special Branch of Food, Civil Supplies and Consumer Affairs Department on 21.11.1999. What transpired during these three days has not been explained and, therefore, there is a delay.

4.2 Last but not the least, Mr. Thakkar submitted that the detaining authority was aware about the fact that the detention was approved by the State Government and then it was required only to forward the representation to the Government and still the authority has considered and rejected the representation of the detenu. This fact is revealed from the affidavit in reply filed by the detaining authority. Mr. Thakkar has drawn attention of this Court to decision in the case of Navalshankar Ishwarlal Dave v. State of Gujarat, AIR 1994 SC 1496 and submitted that the action on part of the detaining authority was beyond authority, which has affected the right of the detenu of making an effective representation. In any case, the petition, therefore, deserves to be allowed and may be allowed.

5. Mr. K.T. Dave, learned Assistant Government Pleader, has opposed this petition on behalf of respondents No.1 to 3 and Ms. Davawala, learned Additional Central Government Standing Counsel has opposed this petition on behalf of respondent No.4-The Union of India.

5.1 Mr. Dave submitted that the affidavits in reply filed by the detaining authority as well as the State Government indicate that the representation made on behalf of the detenu has been attended to and it has not remained unattended. The delay that is caused is because of the procedure that is required to be followed and, therefore, the time consumed in processing the representation, having been properly explained, cannot vitiate the continued detention. It cannot be said that the said delay has remained unexplained and, therefore, there is infringement of right of the detenu of making an effective representation.

6. Having regard to the rival side contentions, the first factor that catches attention is the delay caused

in forwarding the representation by the detaining authority. Admittedly, the representation made on behalf of the detenu was received on 16.11.1999. The detention was approved on 12.11.1999 and, therefore, the detaining authority was only expected to forward the representation to the State Government. The representation is forwarded on 18.11.1999. The detaining authority has not explained as at what point of time, the representation was received on 16.11.1999 and how it was dealt with on 17.11.1999 and, therefore, taking a liberal view that the representation may have been received on 16.11.1999 by evening, then also, the time consumed in forwarded till 18.11.1999 remains unexplained, i.e. there is no explanation coming forward as to what was done in respect of the representation on 17.11.1999. For this one day, probably, the representation remained unattended. This inaction and want of attention to the representation can be considered as sufficient to have infringed the right of the detenu of making an effective representation.

7. Apart from the above defect, there is one more aspect that is emerging which is reflected from the affidavit in reply filed by the detaining authority. The detaining authority, although aware about the fact that the detention order is approved by the State Government on 12.11.1999, has also rejected the representation. Mr. Dave, learned Assistant Government Pleader, who is assisted by the file of the Government along with an official from the department, has read over to the Court a communication from the detaining authority to the detenu dated 18.11.1999, wherein the detaining authority has categorically state that the representation is considered on merits and is rejected. The detaining authority, in doing so, has exceeded its authority, as once the detention is approved by the Government, the detaining authority become functus officio and it has no authority to revoke or rescind or modify the order. All that the detaining authority can do is to forward the representation to the Government for appropriate decision. In this regard, the decision in the case of Navalshanker Ishwarlal Dave (supra) can profitably be considered.

8. The continued detention of the detenu, therefore, would stand vitiated for the above stated reasons. Mr. Thakkar, in view of the above observation, does not press for a verdict on aspect of delay in consideration of the representation by the State Government.

9. In view of the above discussion, the petition is allowed. The impugned order of detention dated November

1, 1999 is hereby quashed. The detenu-Mulshankar Kalyanbhai Jani is ordered to be set at liberty forthwith, if not required in any other matter. Rule is made absolute with no orders as to costs.

[ A.L. DAVE, J. ]

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